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No. 97-1121

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

City of Chicago,
Petitioner,

v.

Jesus Morales, *et al.*,
Respondents

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

Is Chicago's Gang Congregation Ordinance void for vagueness, an unjustifiable restraint of personal liberty in violation of the Fourteenth Amendment, or an authorization of unreasonable searches and seizures in violation of the Fourth Amendment?

INTEREST OF AMICUS CURIAE

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "[e]nsure justice and due process for persons accused of crime . . . [f]oster the integrity, independence and expertise of the criminal defense profession . . . and [p]romote the proper and fair administration of justice". NACDL has almost 10,000 members nationwide -- along with 80 state and local affiliate organizations representing another 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this court on many occasions as *amicus curiae*.[1]

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1. Both parties have consented to NACDL's appearance in this matter as *amicus curiae*. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary

STATEMENT OF THE CASE

On June 17, 1992, the City of Chicago adopted a "Gang Congregation Ordinance" ("the ordinance"). The ordinance provides:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Chi. Mun. Code § 8-4-015(a).

Section 8-4-015(c)(1) defines "loiter" as "to remain in any one place with no apparent purpose." Section 8-4-015(c)(2) defines "criminal street gang" as "any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more" enumerated criminal acts, "and whose members individually or collectively, engage in or have engaged in a pattern of criminal gang activity." Section 8-4-015(c)(5) defines "public place" as "the public way and any other location open to the public, whether publicly or privately owned."

The Chicago Police Department began enforcing the ordinance under a general order issued on August 8, 1992.

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contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

See Chicago v. Morales, 687 N.E.2d 53, 59 (Ill. 1997). Enforcement was suspended when the state Court of Appeals declared the ordinance unconstitutional in December, 1995. *See Chicago v. Youkhana*, 660 N.E.2d 34 (Ill. App. 1995). In the forty-one months of enforcement, the Chicago police arrested about 43,000 individuals on the authority of the ordinance. Richard M. Daley & Terry G. Hillard, **Gang and Narcotic Related Violent Crime, City of Chicago 1993-1997** at 7 (June 19, 1998).

The Illinois Court of Appeals unanimously held that the ordinance violated the First Amendment overbreadth doctrine, the Illinois state constitutional right to peaceable assembly, the Fourteenth Amendment void-for-vagueness doctrine, the Eighth Amendment's prohibition on status offenses, and the Fourth Amendment. *Chicago v. Youkhana, supra*. The Illinois Supreme Court unanimously affirmed, holding that the ordinance is void for vagueness and a violation of substantive due process. *Chicago v. Morales, supra*. The Illinois Supreme Court did not reach questions under the overbreadth doctrine, the Fourth Amendment, or the state constitution.

SUMMARY OF ARGUMENT

The Illinois Supreme Court held the ordinance void for vagueness and a violation of substantive due process. This Court should affirm those holdings.

The indeterminacy of the ordinance confers lawless discretion on the Chicago police. Gang membership in Chicago is, by any measure, distressingly common, so that even if the police targeted only *bona fide* gang members,

they would have a sweeping license to hector groups of young people. The police, moreover, can perceive gang membership when none exists. The police decide when citizens have "no apparent purpose," so that purposes apparent to the citizen need not be apparent to the police. The police decide when submission to their commands does not follow "promptly," and the police decide what it means to "disperse" and to "remove . . . from the area."

Citizens cannot know when they are liable under the ordinance. They do not know whether their companions are in fact gang members, let alone apparent gang members. They do not know when they have "no apparent purpose" while standing on public ground. They do not know how far they must disperse before they "remove themselves from the area." The statutory requirement of a police warning does nothing to cure the failure to give fair warning, because the citizen has the right to know, not when he or she might be arrested, but when he or she might be convicted.

The Illinois Supreme Court determined that the ordinance is an arbitrary violation of the liberty protected by the Fourteenth Amendment, and thus forbidden by substantive due process. The liberty to move about in public, free from physical restraint, lies at the heart of the traditional understanding of due process. That freedom is subject to abridgement only when public policy is narrowly tailored to serve a compelling state interest. Here, citizens who comply with police orders are not incarcerated, but are nonetheless deprived of the fundamental right to stay or to go at will, free from coercive restraint.

If this Court should reverse the Illinois Supreme Court on both vagueness and substantive due process grounds, the judgment below should be affirmed on the basis of the Illinois Appellate Court's holding on Fourth Amendment grounds. A law authorizing the police to detain and question individuals for "loitering" with a gang member would violate the Fourth Amendment as construed in *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. Here the statute authorizes custodial arrest and subsequent punishment for conduct that does not even meet the *Terry* reasonable suspicion standard. A substantive criminal law that serves interests independent of authorizing police investigation of other, incipient offenses quite validly expands police authority to stop, question, and arrest. This ordinance, by contrast, furthers no public interest other than expanding police authority to prevent or investigate other crimes.

ARGUMENT

I. THE ORDINANCE IS VOID FOR VAGUENESS

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). Although these two inquiries are related, the Court has placed less emphasis on fair notice, and more on setting limits on police discretion. *See id.*; *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Accordingly, we begin with considering the ordinance from the

standpoint of the police.

An officer applying the ordinance must make three determinations: that a group includes a gang member; that the members are loitering; and, that they have failed to comply with a dispersal order. The first determination depends on two subsidiary questions. The first is associational: does this citizen belong to a particular organization? The second is classificatory: does that organization qualify as a "criminal street gang" under the ordinance?

At the associational level the officer's discretion is extensive. "The Chicago police department estimates that there are 130 street gangs with membership estimated to be 125,000 strong." **Gang and Narcotic Related Violent Crime**, *supra*, at i. *Bona fide* gang members may not advertise their affiliation by wearing colors. Moreover, some persons, although not gang members, wish to be perceived as such. Once *bona fide* members may have withdrawn from gang activities but still be reasonably believed to be current members. Given the number of genuine gang members, the difficulty of establishing actual membership, and the "wannabe" phenomenon, it will be a rare group of urban youths that does not include at least one person whom the police may "reasonably believe" to be a gang member.

Few police officers will advert to the classification problem, but the difficulty of applying the definition of "criminal street gang" exposes the scope of police discretion under the ordinance. While the definition does indeed cover street gangs like the Gangster Disciples, it also covers a

host of other organizations, leaving it to the police to define the scope of liability under the ordinance. Any group that includes any members who have cooperated to commit two of the enumerated crimes, after the adoption of the ordinance and within five years of the "loitering," qualifies as a criminal gang under § 8-4-015(c)(2)-(4).

Two brothers who sell marijuana to their friends constitute a "criminal street gang," because § 8-4-015(c)(3) includes delivery of cannabis as an enumerated crime. Section 8-4-015(c)(3) also includes bribery, so that had the ordinance been in effect throughout the 1990's, the Chicago Board of Alderman would constitute a "criminal street gang" -- although this possibility generated only laughter when raised before the Board in debate. *See* Tom McNamee, *Here Comes the Bribe*, Chi. Sun-Times Jan. 14, 1996, 18, 1996 WL 6727207. How many labor unions qualify as "criminal street gangs" under the ordinance, given that the same section enumerates the offenses of bribery, intimidation, and compelling organization membership? The members of such organizations are free to have "no apparent purpose" in public, but not because of the terms of the statute. They enjoy this freedom only at the sufferance of the police.

The officer next must determine whether members of the group are loitering, defined as having no apparent purpose. Apparent to whom? Young people may find ample purpose in talk of sports, sex, or popular music, although that purpose be quite obscure to an observer from a different generation or *milieu*. They may find quite urgent purpose simply in being away from the undesired company of parents or intimate partners, or more simply yet in the

physical proximity of peers who share their life and its challenges. Are these purposes "apparent" within the meaning of the ordinance? With respect to the decision to warn and then arrest, only the police can answer that question.

The ordinance leaves the police with lawless discretion to determine when citizens have complied with an order to disperse. They must do so "promptly," which means that no matter how fast the citizens disperse, the officer may find them dilatory enough to be arrested. They must "remove themselves from the area," which means that no matter how far they go, the officer may find them close enough to be arrested. They must "disperse," but so long as city streets run in only two directions, the officer may find them still in groups and so subject to arrest.

This Court has struck down much clearer laws. In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Court struck down an ordinance providing, *inter alia*, that "persons wandering or strolling around from place to place without any lawful purpose or object" were vagrants subject to arrest and prosecution. "A presumption that people who might walk or loaf or loiter or stroll . . . is too precarious for a rule of law." *Id.* at 171. In *Kolendar v. Lawson, supra*, the Court struck down an ordinance that, as construed by the state courts, required persons validly stopped under *Terry v. Ohio, supra*, to provide "credible and reliable" identification. "It is clear that the full discretion accorded to the police to determine whether the suspect has provided a 'credible and reliable' identification necessarily 'entrust[s] lawmaking 'to the moment-to-moment judgment of the policeman on his beat." 461 U.S.

at 360 (citations omitted).

The portion of the Jacksonville ordinance that prohibited "wandering or strolling . . . without any lawful purpose" was not conjoined with other problematic inquiries into group membership or adequacy of compliance with a police order. The "credible and reliable" identification requirement in *Lawson* was predicated on a valid *Terry* stop, with no other levels of police discretion. In this case, the police have both *Papachristou*-type discretion to determine when a group is "loitering," *plus Lawson*-type discretion to evaluate a citizen's response to a police demand, *plus* an anterior level of discretion to decide whether a group includes an apparent gang member.

The ordinance also fails to give fair notice to citizens of what conduct is criminal. The citizen faces the same association and classification problems as a police officer. But the citizen also faces additional uncertainties. A citizen cannot know when a group includes a person reasonably believed by the police to be a gang member. One might suppose that at least a *bona fide* gang member would know when he is violating the ordinance, but such is not the case. The ordinance does not prohibit loitering in a group that includes a gang member; it prohibits loitering in a group that includes a person whom the police reasonably believe to be a gang member. Thus even if Citizen A knows that Citizen B, with whom he shares a street corner, is a gang member, Citizen A cannot know whether Citizen B can reasonably be believed to be a gang member.

Nor can a citizen know when the members of a group have "no apparent purpose," or when she has

"removed [herself] from the area" "promptly" enough to avoid liability. In *Palmer v. Euclid*, 402 U.S. 544 (1971), the Court reversed a conviction on fair-notice grounds under an ordinance forbidding wandering at night "without any visible or lawful business," even as applied to a suspect who gave three different addresses and who claimed to have dropped off a friend whose name he did not know.

The cases relied on by petitioner and opposing *amici* are inapposite. The statute upheld in *Colten v. Kentucky*, 407 U.S. 104 (1972), required congregation and refusal to disperse "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof[.]" 407 U.S. at 108. The statute was not tested on its face, but as applied, the Court easily concluding that "[a]ny person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he can be *convicted* . . if he fails to obey an order to move on." *Id.* at 110 (emphasis added). This Court has recognized that a *scienter* requirement helps to sustain a statute against void-for-vagueness attack. *See Posters 'N' Things v. United States*, 511 U.S. 513, 526 (1994). Colten knew his intentions better than anyone; if he acted with the intent to cause public inconvenience, as the trial court found, he indeed would have known that he could be convicted as well as arrested. Moreover, the Kentucky police -- who asked Colten to leave nine or ten times (*see Colten v. Commonwealth*, 467 S.W.2d 374, 376 (Ky. 1971)) -- knew that they could not arrest anyone simply for refusing to move along, but could arrest only those whose conduct manifested an intent to cause public inconvenience.

The *scienter* requirement in the Kentucky disorderly-conduct statute implicitly required proof of conduct calculated to cause public inconvenience or alarm. Absent a confession, the state could prove *scienter* at trial in no other way. Thus, the statute upheld in *Colten:* (1) did not involve any guesswork about the associations of group members; (2) did not involve any guesswork as to when citizens have no lawful purpose; (3) did not involve any consideration of the adequacy of citizen compliance with a dispersal order, as Colten never attempted to leave; and (4) did require proof of *scienter* with respect to causing observable harm to the public. The Court tested the statute as applied, so that nothing in *Colten* suggests that application of the statute to conduct calculated to cause mere "annoyance" would have survived constitutional challenge. *Cf. Coates v. Cincinnati*, 402 U.S. 611 (1971). Finally, nothing in the Court's opinion -- an opinion primarily addressing the then-urgent question of vindictive sentencing in trial *de novo* criminal court systems -- suggests that the police order to move along played any role in insulating the statute from challenge.

Boos v. Barry, 485 U.S. 312 (1988), does not help petitioner. As construed by the Court of Appeals and this Court, the statute challenged there forbids congregation and refusal to disperse within 500 feet of a foreign embassy when "normal embassy activities have been or are about to be disrupted." 485 U.S. at 332. So construed, the statute is specific as to area and as to the forbidden effect. *Grayned v. Rockford*, 408 U.S. 104 (1972), is distinguishable on the same grounds.

Yet more specific were the drug-paraphernalia laws

upheld in *Posters 'N' Things*, *supra*, and *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982). *Posters 'N' Things* upheld a statute that specifically enumerated certain items, such as "bongs, roach clips, and pipes designed for use with illegal drugs," 511 U.S. at 526, as drug paraphernalia *per se*. *Flipside* upheld an ordinance requiring a license to sell anything "designed or marketed for use with illegal cannabis or drugs," phrases the Court found, respectively, to be "sufficiently clear" and "transparently clear." 455 U.S. at 501-502.

The suggestion that the warning the police must give before arresting under the ordinance cures the vagueness of the statute misses the point of the void-for-vagueness doctrine. The police warning obviously cannot cure the lawless discretion of the police, who decide when the warning is issued and can easily find inadequate compliance with a dispersal order when they desire. *See Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965). Nor can the dispersal order cure the fair notice problem.

The citizen has a right to fair notice *from the legislature* as to what conduct will expose the citizen to *conviction*. In rare cases, notice can be supplied by the courts, either in the definition of common-law crimes or in the interpretation of an otherwise vague statute. But the fair notice idea leaves no room for intermediate law-making by the police.

The law allows the police to arrest innocent people so long as there is probable cause, and practically speaking a citizen must submit to an illegal arrest, however arbitrary. A citizen, however, has the right to know when conduct for

which he may be arrested is nonetheless lawful. Put another way, a citizen has the right to know when a police threat of arrest exceeds legislative authority, so that the citizen can acquiescence in arrest confident of making a defense in court and so establishing his right to engage in the conduct for which he was arrested. *See Bouie v. City of Columbia*, 378 U.S. 347, 355 n.5 (1964) (reversing conviction on ground that application of state statute to defendant's conduct was unforeseeable: "We think it irrelevant that petitioners at one point testified that they had intended to be arrested."). In *Colten* and *Boos* the statutes predicated arrest on defiance of a police order; in *Grayned* the defendants were in fact warned by the police before being arrested. Yet the Court placed no emphasis on the police warnings in these cases.

As applied to this case, the citizens of Chicago have a right to know when they are, and are not, in violation of the ordinance. If they know that they are not in violation, they are within their rights -- and indeed within a proud American tradition of defying excesses of authority -- to reply to the officer: "No, sir. We are not going to disperse. Arrest us if you will, and we will see you in court." This they cannot do under the ordinance, for they cannot know with any confidence when they are "loitering" with anyone "reasonably believed to be a gang member."

This analysis also applies to the possibility that the Chicago Police Department's general order cures the vagueness of the ordinance. So long as citizens cannot defeat a charge under the ordinance by raising a violation of the order as a defense, the citizen is deprived of fair notice because he is vulnerable to an individual officer's decision

to violate the order. The Illinois Supreme Court concluded that respondent Morales was convicted despite just such a violation of the order, *see* 687 N.E.2d 64 n.1, and the state Court of Appeals pointed out that "the Chicago police department is not a judicial agency and has no power to make a judicial determination of the meaning of an ordinance." 660 N.E.2d at 41.

The federal courts have no authority to read the general order into the ordinance, or to otherwise narrow the scope of the ordinance by interpretation. Federal courts may save a borderline *federal* statute from vagueness challenge through limiting interpretation, but the meaning of a local ordinance is the province of the state courts. *See Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972); *Grayned, supra*, 408 U.S. at 110. As the Illinois Court of Appeals concluded, "it would be impossible to save the Chicago ordinance by judicial construction." 660 N.E.2d at 41.

While it is certainly preferable for high-ranking police officers to exercise discretion through the rule-making process, this process does not eliminate police discretion but at best transfers it from the street to headquarters. The executive branch of the government is still making the law.

The cases cited by the United States are not to the contrary. Federal courts are well within their rights to construe federal statutes, *e.g., Boos, supra*, or to defer to agency interpretations, *e.g., Ehlert v. United States*, 402 U.S. 99, 107 (1971) (following agency practice in deciding federal statutory question). *Cf. Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Properly

cabined by legislative guidance, Congress may delegate to the executive power to promulgate regulations whose violation can be punished as a crime. *Touby v. United States*, 500 U.S. 160 (1991). Here, however, the state courts expressly found that there was no delegation of the power to promulgate enforceable limits on the meaning of the ordinance.

Hoffman Estates v. Flipside, supra, did place some emphasis on guidelines issued by the prosecutor interpreting a drug paraphernalia ordinance. In that case, however, the village code provided that any interested person could petition the appropriate department of the village government for a rule clarifying his legal obligations. *See Flipside v. Hoffman Estates*, 639 F.2d 373, 385 n.30 (7th Cir. 1981), *rev'd*, 455 U.S. 489 (1982). As this Court noted in *Flipside*, "instead of applying for a license or seeking clarification via the administrative procedures that the village had established for its licensing ordinances, Flipside filed this lawsuit . . . ." 455 U.S. at 493 (footnote omitted). In effect, Flipside had waived the opportunity to have the prosecutor's guidelines given the force and effect of law through the rulemaking process. Thus it is easy to see why throughout the litigation, in the words of the Seventh Circuit in *Flipside*, "the license guidelines . . . became an integral part of the ordinance." 639 F.2d at 378.

Moreover, *Flipside* involved a licensing scheme, not a criminal prohibition. Business people subject to economic regulatory schemes are held to a higher standard of understanding their obligations. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 428 (1961) (vagueness analysis more generous in regulatory context); *United States v.*

Dotterweich, 320 U.S. 277 (1943) (upholding strict liability conviction under regulatory statute). Guidance from the enforcement authorities may help to defeat a vagueness challenge to a regulatory statute. The *Flipside* Court emphasized this point. *See* 455 U.S. at 498 & n.12 (citing *McGowan, supra*).

If the Court reads *Flipside* as expressing the view that informal, unenforceable law enforcement policies can substitute for legislative definition of criminal offenses, we respectfully submit that any such expressions -- which were not necessary to the result in *Flipside*[2] -- should be disavowed. Affirming such a view would imply that absent the police department's general order, the ordinance would be unconstitutional. This in turn would entitle defendants to plead violations of the general order as a defense, a result expressly rejected by the state courts, whose ruling is immune to second-guessing in federal courts under *Wilson* and *Grayned*.

II. THE ORDINANCE UNJUSTIFIABLY DEPRIVES INDIVIDUALS OF PHYSICAL LIBERTY, IN VIOLATION OF THE FOURTEENTH AMENDMENT

The court below held that the ordinance violates substantive due process, and did not reach the Fourth Amendment theory endorsed by the state Court of Appeals. Whether or not the ordinance's limit on personal mobility

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2. *See* 455 U.S. at 501 (noting *both* that guidelines clarified "designed for use," *and* that standard dictionaries indicate that business people could understand this phrase).

amounts to a Fourth Amendment "seizure,"[3] it follows that the rule of *Graham v. Connor*, 490 U.S. 386 (1989), has no bearing on this case. While this Court might reach the Fourth Amendment issue to affirm the Illinois Supreme Court, *see, e.g., Schenck v. Pro-Choice Network of Western New York*, 117 S. Ct. 855, 870 n.12 (1997), it should do so only if it first rejects the substantive due process theory relied on by that court.

Both the Illinois courts and the petitioner, however, have mischaracterized the due process issue. The ordinance is no garden-variety exercise of the police power, subject to rational-basis scrutiny in a post-*Lochner* world. Rather, the ordinance abridges physical liberty by coercively restricting the public space available to perceived gang members and their friends. Known gang members may not publicly associate with anyone in public, including indoors at commercial establishments open to the public. While other citizens may go about in public, they must avoid the company of friends who might be gang members.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). For Blackstone, liberty under Magna Charta's Chapter 39 meant "the power of locomotion, of changing situation, or moving one's person

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3. In our view, due process analysis, rather than Fourth Amendment analysis, ought to apply when the state restricts personal mobility by making certain areas off-limits, as distinct from taking persons into custody, however briefly. *See Sacramento v. Lewis*, 118 S. Ct. 1708, 1715 (1998).

to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." William Blackstone, 1 **Comm.** *134. Chancellor Kent read due process as protecting "personal liberty," with habeas corpus supplying a remedy for "all unlawful restraint or imprisonment." James Kent, 2 **Comm.** *26. While the Fourteenth Amendment was pending before the states, Judge Cooley wrote that Blackstone's definition of liberty "implies that certain qualifications . . . rest upon this power, which are known to the law and enforced by it. without infringing upon constitutional liberty." Thomas Cooley, **Constitutional Limitations** 339 (1st ed. 1868). The state, Cooley wrote, could restrict personal liberty to punish and prevent crime; to punish and deter contempts; to conscript for military service; and to protect society from those who "by reason of mental infirmity, are incapable of self-control." *Id.* This list was exhaustive. After discussing the private, as opposed to public, restrictions on liberty known to the law, Cooley concluded that "[f]or any other restraint, or any abuse of the legal rights which have been specified, the party restrained is entitled to immediate process from the courts, and to speedy relief." *Id.* at 342.

The early writers treated personal liberty in discussing habeas corpus, the traditional remedy for violations of Magna Charta or of American due process or law-of-the-land clauses. But they were adamant that incarceration was not the only way in which liberty could be restrained. "The confinement of the person, in any wise, is an imprisonment; so that the keeping of a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment." Blackstone, *supra*, at *136. "Every restraint upon a man's

liberty is, in the eyes of the law, an imprisonment, wherever may be the place or whatever may be the manner in which the restraint is effect." Kent, *supra*, at *26.

The ordinance leaves gang members and their friends far more liberty than they would enjoy in jail. Yet the difference is one of degree, not of kind. A curfew applicable only to apparent gang members and their companions would work a clear deprivation of liberty. *See Hirabayashi v. United States*, 320 U.S. 81, 99 (1943). A law that prohibited apparent gang members from attending the movies would likewise work a clear restraint, even though those restrained had perfect freedom to go anywhere else. House arrest, electronic or personal monitoring, banishment from certain places or establishments -- these are familiar features of probation imposed as punishment for crime. To impose such restrictions on persons solely on account of perceived gang membership amounts to physical restraint, not an ordinary exercise of the police power.

The suggestion that the ordinance does not abridge this freedom, on the theory that apparent gang members and their friends retain the right to perpetual motion, smacks more of Kafka than of our Constitution. The right to come and go at will includes the right not to go at the behest of the police. In any event, those told to move on by police applying the ordinance know that they are not free to go to any public place in the city.

Little less bizarre is the suggestion that the ordinance allows gang members to go where they wish so long as they go alone. Solitude is not easily achieved in the public spaces of major cities, so that the ordinance

necessarily bars apparent gang members from any location shared by other human beings -- a major restraint on the freedom to come and go. Moreover, to be allowed access to public places only on the condition of abandoning one's friends puts a heavy burden on the exercise of the right of locomotion. *Dallas v. Stanglin*, 490 U.S. 19 (1989), stands for the proposition that juveniles have no constitutional right to meet older strangers on business premises, not for the proposition that the state can condition use of the streets on solitude. *Coates v. Cincinnati*, *supra*, 403 U.S. at 615-16, squarely holds that a vague statute's constitutional infirmity is aggravated, rather than mitigated, when it applies to groups rather than to individuals.

Laws restricting personal liberty to come and go at will are not subject to rational-basis review, but rather must be narrowly-tailored to serve a compelling state interest. *See, e.g. Reno v. Flores*, 507 U.S. 292, 301-302 (1992); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992). In applying this test, the Court would recognize no new fundamental right. Instead, the Court simply would recognize that laws making public ground off-limits to persons designated by the police restrain the physical freedom to come and go that lies at the heart of the "liberty" protected by the due process clause. *See Williams v. Fears*, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment . . . ."); John Paul Stevens, *The Third Branch of Liberty*, 41 **U. Miami L. Rev.** 277, 287-88 (1986).

Vagrancy laws are also part of our legal tradition. Historically, vagrancy laws have performed two quite distinct functions. One function has been to protect the perfectly legitimate state interest in preventing crime. The other role played by vagrancy law has been the illegitimate, even odious, function of cowing members of disfavored groups, whether they be medieval serfs, freed slaves subject to Reconstruction-era Black Codes, progressive-era labor activists, or, more recently, homosexuals and urban blacks. *See* William Quigley, *Five Hundred Years of English Poor Laws, 1349-1834*, 73 **Akron L. Rev.** 73, 89-91 (1996) (medieval vagrancy laws exploited serfs by suppressing competition for labor); Eric Foner, **Reconstruction** 198-210 (1988) (discussing Black Codes, in which vagrancy laws played a prominent role); James Gray Pope, *Labor's Constitution of Freedom*, 106 **Yale L.J.** 941, 1009 (1997) (example of vagrancy law used against strikers); Shanon Minter, Note, *Sodomy and Public Morality Offenses under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 **Cornell L. Rev.** 771, 804 (1993) (vagrancy laws "used in a variety of instances to harass homosexuals.") (footnote omitted); William Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 **Mich. L. Rev.** 1016, 1077 (1995) ("Racism combined with broad police discretion was, after all, what prompted courts to invalidate vagrancy and loitering laws in the first place.")

No legal tradition should be expected to be free from occasional contradictions. When elements in the tradition conflict, the Court must choose among them. *Terry v. Ohio* incorporated into Fourth Amendment law all of the legitimate interests served by traditional vagrancy law. *Papachristou* repudiated the oppressive aspect of the

vagrancy laws. If *Papachristou* is thought insufficiently clear on the point, we submit that the tradition of personal liberty, recognized in the earliest sources of due process, deserves priority over the tradition of repression and discrimination embodied in traditional vagrancy law. The place of the Alien and Sedition Acts in First Amendment jurisprudence offers a suggestive analogy.

In any event, the ordinance is not a traditional vagrancy ordinance. Loitering laws, as distinct from vagrancy, are of relatively recent vintage. The oldest case we have found using the term "loitering" is In re *May*, 1 N.W. 1021 (1879), a post-Fourteenth Amendment decision, which emphasized that vagrancy "can only reach such cases of vagabondage as come fairly within the common law meaning of the word, which was possibly designed to protect the public from expense, quite as much as from disorder." 1 N.W.2d at 1022. The *May* court had something else to say pertinent to this case: "Making, as we are disposed to make, all proper allowance for the zeal of police officers in dealing with persons who are supposed to be bad members of society, it is the duty of all courts to prevent good or bad citizens from being unlawfully molested." *Id.* at 1023.

If loitering laws are relatively recent variations on vagrancy, the ordinance is an entirely novel variation on loitering law. *Papachristou* threw out loitering defined solely as having no lawful business while in public. Modern loitering laws typically require no lawful business *plus* some additional act, mental state, or consequence. *See, e.g.*, American Law Institute, **Model Penal Code** § 250.6 (1962) (prohibiting loitering "under circumstances that warrant

alarm for the safety of persons or property in the vicinity."). The ordinance, by contrast, criminalizes loitering plus suspected membership in an organization, when actual membership in that organization is not itself a crime. That may be good policy; it probably violates the First Amendment; but it is certainly not traditional.

The "shock the conscience" test adopted for unintentional official homicides in *Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), is inappropriate here. The *Lewis* plaintiffs sought recognition of a new, unenumerated right. Respondents here assert their right to come and go without police permission, the central meaning of constitutional "liberty" since the dawn of the Republic. The "shock the conscience" test is obviously vague, and it gives insufficient protection to personal liberty. This Court has never struck down state action under the test. *Rochin v. California*, 342 U.S. 165 (1952), whence the test derives, involved a warrantless midnight entry without probable cause, followed by the notorious stomach-pumping. This conduct was unconstitutional under the Fourth Amendment and *Wolf v. Colorado*, 338 U.S. 25 (1949), quite aside from any conscience-shocking. Conscience-shocking was the benchmark for when a federal exclusionary remedy was to supplement state tort remedies for Fourth Amendment violations.[4] The conversion of this remedial analysis into a highly open-textured test of substantive rights may be too late to reverse, but it should not be expanded -- least of all

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4. For a fuller treatment, see Donald Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 **Ill. L. Rev.** 261, 265-72.

to test restraints on the basic liberty of physical freedom. The *Rochin* test has not governed this Court's recent cases involving physical restraints. *See Foucha, supra; Flores, supra; Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); *United States v. Salerno*, 481 U.S. 739 (1987); *Schall v. Martin*, 467 U.S. 253 (1984).

Tested under the appropriate standard, the ordinance fails. While the prevention of violent crime may be a compelling state interest, *see Salerno, supra*, 481 U.S. at 749, this Court has accepted crime-control as a justification for physical restraint only when those restrained have given some specific and powerful indicia of dangerousness. Those restrained must have behaved so as to suggest *imminent* danger, as in *Terry v. Ohio, supra*, or to have committed prior crimes under circumstances highly probative of recidivism, as in *Hendricks* and *Salerno*. The ordinance, by contrast, requires no specific conduct manifesting criminal propensity other than public association with an apparent gang member.

The state has not made gang membership, as such, a crime. *See Youkhana*, 660 N.E.2d at 42. The state probably could not do so under the demanding test of *Scales v. United States*, 367 U.S. 203 (1967). To the extent an inference of imminent crime may fairly be drawn from apparent gang membership and other circumstances, *Terry* allows the police to take forcible steps to prevent the incipient offense. The Chicago police certainly may take apparent gang affiliation into account in assessing probable cause or reasonable suspicion under *Terry*. *See* In re *M.N.*, 645 N.E.2d 494, 502 (Ill. App. 1994); *People v. Bobe*, 592 N.E.2d 301, 308 (Ill. App. 1992).

Sibron v. New York, 392 U.S. 40 (1968), however, squarely holds that prolonged, apparently idle, association with known criminals does not by itself give rise to the reasonable suspicion demanded by *Terry*. The *raison d'etre* of the ordinance is to authorize coercive police intervention otherwise forbidden under the Fourth Amendment, *i.e.*, to draw an inference of imminent crime from mere suspicion of gang involvement. While a move-on order may not constitute a Fourth Amendment "seizure," it certainly amounts to a deprivation of "liberty" under the Due Process Clause. This Court's decisions, and our constitutional tradition, require testing such limitations on physical freedom under the strict-scrutiny standard.

The ordinance authorizes the exclusion of gang members and their friends from public space without regard to prior crimes or present indicia of danger. It is not limited to juveniles, as were the restraints in *Flores* and *Schall*. It applies to competent adults, not just those who have, as in *Hendricks*, lost the power of self-control on account of mental aberration. It applies at all hours of the day, to all public places in the city. Those who comply with move-along orders enjoy no procedural safeguards whatsoever against erroneous or malicious enforcement. The city chose not to incorporate even the minimal standards contained in the police department's general order into the ordinance itself. Indeed, given the previous vagueness analysis, the ordinance is not narrowly tailored in any sense. Finally, a host of strategies -- vigorous exercise of the stop-and-frisk power allowed under *Terry*, community policing, more secure communications, and adding police manpower, to name a few -- offers less intrusive alternative approaches to controlling gang-related crime.

III. The Ordinance Violates the Fourth Amendment

There can be no doubt that persons arrested under the ordinance are "seized" within the meaning of the Fourth Amendment. Arrest carries with it the power to search. *Robinson v. United States*, 414 U.S. 218 (1973). Thus the ordinance authorizes the arrest and search of persons who, absent the ordinance, could not even be detained or frisked, under *Sibron*, *supra*. If the statute were cast as an authorization of police investigation, rather than as a substantive offense -- *i.e.*, if it provided that "loitering with suspected gang members provides probable cause to believe the suspects are about to commit a crime" -- it would be plainly unconstitutional. *See, e.g., Payton v. New York*, 445 U.S. 573 (1980) (striking down New York statutes authorizing warrantless home entries to arrest).

Of course every substantive offense expands police authority to stop, search, and arrest. But denominating broader police powers substantive crimes should not insulate state laws from Fourth Amendment challenge. A statute making it a crime to refuse to step outside when summoned by the police would fare no better than the statutes struck down in *Payton*. A law making it a crime to arouse the suspicions of the police, or to refuse consent to search, could not survive Fourth Amendment scrutiny.

The difference between a substantive offense forbidding disorderly conduct, or marijuana possession, or gun possession, and a "substantive" offense of causing the police to become suspicious, is that the valid substantive offenses of the former type protect some social interest that

is independent of expanding police investigative powers. Disorderly conduct causes a risk of violence; marijuana possession threatens public health and morals; gun possession is one indicia of other potential crimes, but gun regulations also prevent accidents and prevent weapons from falling into the hands of other persons who might use them criminally. Occasionally, a substantive offense, such as possession of burglar's tools, will simply specify liability for attempt. Here as elsewhere legislatures deserve great deference in fashioning the substantive criminal law, but a line must be drawn somewhere or probable cause and reasonable suspicion will mean nothing.

The place to draw that line is here, because the ordinance protects no constitutionally cognizable interest other than crime prevention, and it ostensibly prevents crime solely by circumventing the Fourth Amendment. To the extent the ordinance serves the interest of preventing or exposing crime by gang members and their associates, it does so only by expanding police arrest and search powers in defiance of the *Terry* standard. The only other interests the ordinance might serve are to protect groups including gang members from criminal violence by other private persons, and to alleviate the fear apparent gang members cause other citizens.

To the extent that citizen fears of gang-related crime are objectively reasonable, the police have power under *Terry* to investigate forcibly. To the extent that citizen fears arise without objectively reasonable grounds to suspect the commission of other crimes, *Coates v. Cincinnati*, *supra*, forecloses any justification of the ordinance on that ground. "Our decisions establish that mere public intolerance or

animosity cannot be the basis for abridgment of these constitutional freedoms [of free assembly and association]." 402 U.S. at 615 (citations omitted). *Coates* likewise excludes the possibility that the ordinance might be justified to protect loiterers from shooting by hostile gangs.

Many citizens quite sincerely, however irrationally, feel fear and loathing in the presence of blacks, homosexuals, or immigrants. At times this hostility can make it likely that an undesirable citizen who steps into hostile territory may become a victim of criminal violence. The logical result of basing laws on community prejudices or blood feuds would be a legally enforced homogeneity, a world in which each must keep to his own. There is no cognizable social interest in catering to bigotry or thuggery. Petitioner may not overcome a Fourth Amendment challenge by invoking interests this Court has held to violate the freedoms of speech and association.

CONCLUSION

The ordinance may have been a useful response to the undeniable problem of gang-related crime. We are skeptical on that point. Homicide numbers change for all sorts of reasons (the economy, age demographics, emergency medical services, drug-use and marketing patterns, even the weather), and on a base rate of several hundred, a small number of incidents looks like a large percentage. If police resources were shifted away from enforcing the ordinance to other uses, any cost to gang enforcement must be balanced against the benefits of resources reallocated to other law-enforcement priorities.

Petitioner points to no controlled study supporting the claim that the ordinance contributed to a decline in gang-related homicides. Even the crude numbers in the city's report, **Gang and Narcotic Related Violent Crime,** *supra*, do not support the inference that the ordinance caused a drop in gang-related crime. In 1994, the first year of vigorous enforcement, gang-related homicides and drive-by shootings actually went up. *Id.* at 2, 7. While homicides classified by police as gang-related dropped in 1995, when the ordinance was in force, there were fewer gang-homicides in 1997 than in 1995. *Id.* at 3, 5. Homicide, overall, has continued to decline. *Id.* at 3-5 (homicides totaled 828 in 1994, 793 in 1996, and 759 in 1997).

As for the claim that the ordinance enabled a less coercive approach to law enforcement, we gently suggest that no law used to arrest three hundred people a week represents a triumph for liberty. Age of first arrest, moreover, is a major predictor of career criminality, *see, e.g.*, Elizabeth Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 **J. Crim. L & Crimin.** 137, 154 n.12 (1997). No doubt some of those first arrested under the ordinance are destined for a life of crime no matter what; but some, especially those arrested for the "crime" of being with a gang member, might well lead law-abiding lives if they can avoid needless induction into the cycle of arrest and recidivism. Needless, hostile encounters with police may label young men as gangsters and foster disrespect for the law. *See* Kathryn Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 **Ind. L. J. 593,** 607-608 (1996).

Whatever the merits of these arguments, this Court

should not uphold the ordinance simply because it appears to be useful. Policy considerations of course have a place in adjudication, even in constitutional adjudication. But policy considerations enter adjudication mediated through legal doctrine, which often rejects apparently urgent social interests in favor of deeper and more permanent values. This Court is not only "the forum of principle." We believe it should also be the forum of long views. *See Korematsu v. United States*, 322 U.S. 214, 245-46 (1944) (Jackson, J., dissenting).

Doctrinally speaking, the ordinance is hopelessly vague, and it unjustifiably abridges both personal liberty and the freedom from unreasonable searches and seizures. These vices compound one another. Vague laws are especially suspect when they trench on other constitutional liberties, and the lawless discretion the ordinance entrusts to the police aggravates the offense to personal liberty. The unanimous court below recognized as much, and its judgment should be affirmed.

Respectfully submitted,

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